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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 185

GILBERT REUTER, ET AL.,

Appellants,

vs.

STATE OF WISCONSIN EX REL. DEPARTMENT OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

FRED M. WYLIE,
Counsel for Appellee.

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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

In the Trial Court.

Action by the State of Wisconsin, respondent, to enjoin Gilbert Reuter, appellant, from violation of a fluid milk market order of the State Department of Agriculture under Section 100.03, Wisconsin Statutes of 1939.

The complaint set out that the market order prescribed:

1. Standards of sanitation in production and handling.

2. Minimum prices for producers.

3. Minimum wholesale prices.

4. Minimum retail prices.

5. Labeling.

Violations of all of these by the defendant were set forth.

The answer denied only the allegation of violation of sanitary requirements, and asserted that:

1. "The minimum prices are unjust, unreasonable, discriminatory and unfair" in not providing a differential for "cash and carry".

2. The statute denies equal protection under the Federal constitution by delegation of judicial and legislative power to an administrative agency.

The trial court struck out the allegations of 1 above, on the ground that defendant had not exhausted his administrative remedy nor brought the matter to the court by an action to review administrative acts, as expressly required by the statute.

The trial court also sustained objection to testimony offered under a claim of discrimination in enforcement, and an "offer of proof" was made.

The trial court made findings that the defendant was handling insanitary milk and otherwise violating the order as alleged in the complaint, and entered judgment enjoining continuation of the violations.

The Stipulation of Issues on Appeal.

Upon appeal to the Supreme Court of Wisconsin, an abbreviated bill of exceptions was stipulated, and:

> "This stipulation is made upon agreement which is a part of the stipulation that the appellants will challenge on appeal only the constitutionality of the Milk Control Law because of discrimination, unlawful dele-

gation of powers, an absence of legislative standards for fixing price, and also the other point of the unconstitutional enforcement of the law."

Defendant made no formal assignments of error upon the appeal to the State Supreme Court, but in his brief made a statement of issues, as follows:

"1. Whether the 1939 Amendment to Section 100.03 renders the statute unconstitutional under Section 1 of the Fourteenth Amendment to the U. S. Constitution or Section 1, Article I, Wisconsin Constitution.

"2. Whether the pretended standards set for fixing prices were sufficiently definite to meet the requirements of a valid delegation of legislative power.

"3. Whether the defendants have been denied the equal protection of the laws by reason of the mode of administration of the act."

Issue 1, above, is the "discrimination" point referred to in the stipulation.

Issue 2, above, is the "unlawful delegation of powers, and absence of legislative standards for fixing price" referred to in the stipulation.

Issue 3, above, is the "other point of the unconstitutional enforcement of the law" referred to in the stipulation, as is definitely shown by the opening statement of the argument in this brief under this issue, as follows:

"At the trial, the defendants, in support of the charge of unconstitutional discrimination, made the following offer of proof which was excluded on the ground that it was irrelevant and incompetent."

* * * * * * *

The brief also quoted from the argument of defendants' counsel to the trial court, which appeared in the bill of exceptions, as follows:

"We are not complaining about the order. * * * But in the enforcement of the order our rights were invaded, * * *."

Decision of Supreme Court of Wisconsin.

The Supreme Court of Wisconsin affirmed the judgment of the trial court, and denied a rehearing.

In its opinion, the State Supreme Court first recited the above "statement of issues" in appellant's brief, and then the stipulation above; and the court then proceeded to discuss and decide the questions therein enumerated, as amplified by appellant's brief as set forth above.

The first question decided was that of the unconstitutionality of the territorial restrictions in the statute. (Appellant's first "statement of issue".) This was decided in favor of appellant. The court then held that the territorial restrictions were severable and the balance of the statute in force without them. This latter was but the construction of the State statute by the State court, is binding upon Federal courts, and presents no Federal question.

The second question discussed and decided by the Wisconsin Supreme Court was that of unconstitutional delegation for failure of sufficiently definite legislative standards for "fixing" prices. (Appellant's second "statement of issue".) This the court decided against appellant, on the authority of *State ex rel. Finnegan* v. *Lincoln Dairy Company*, 221 Wis. 1, in which the 1935 Wisconsin milk control law (in which the standards were stated with less clarity) was held not an unconstitutional delegation. This again was but the interpretation of a State statute by the State court, and of the division of State powers under the State constitution, and presents no Federal question.

Highland Farms Dairy v. *Agnew*, 300 U. S. 608, 57 Sup. Ct. 549, 81 L. Ed. 835.

In any event, the decision of the State courts upholding the constitutionality of the State milk control law against

the contention of an unconstitutional delegation, is correct under the recent decisions of this Court.

Nebbia v. *New York*, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940;

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 55 Sup. Ct. 7, 79 L. Ed. 259;

Borden's Farm Products v. *Baldwin*, 293 U. S. 194, 55 Sup. Ct. 187, 79 L. Ed. 281;

Mayflower Farms v. *Ten Eyck*, 297 U. S. 266, 56 Sup. Ct. 457, 80 L. Ed. 475;

Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346, 59 Sup. Ct. 528, 83 L. Ed. 752;

United States v. *Rock Royal Co-op.*, 307 U. S. 533, 59 Sup. Ct. 993, 83 L. Ed. 1446;

See also:

West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703;

Mayo v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 60 Sup. Ct. 517, 84 L. Ed. 481;

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 60 Sup. Ct. 907, 84 L. Ed. 825;

Opp Cotton Mills v. *Administrator*, 312 U. S. 126, 61 Sup. Ct. 524 (Feb. 3, 1941);

United States v. *Darby Lumber Co.*, 312 U. S. 100, 61 Sup. Ct. 451 (Feb. 3, 1941).

The third question discussed and decided by the Wisconsin Supreme Court was that of unconstitutional discrimination in enforcement. (Appellant's third "statement of issue"). This also was decided against the appellant. This presented only a question of evidence and procedure and not a Federal question.

In any event, it was correctly decided by the State Supreme Court, for (1) the offer of proof was entirely lacking

any element of wilfulness and (2) an administrative remedy was available.

Mackay Co. v. *Little Rock*, 250 U. S. 94, 39 S. Ct. 428, 63 L. Ed. 863;

Keokuk & Hamilton Bridge Co. v. *Salem*, 258 U. S. 122, 42 S. Ct. 207, 66 L. Ed. 496;

(See distinction made, *Bohler* v. *Calloway*, 267 U. S. 479, 487, 49 S. Ct. 431, 69 L. Ed. 745);

Utley v. *St. Petersburg*, 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155;

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 172, 55 Sup. Ct. 7, 79 L. Ed. 259;

Rochester Tel. Corp. v. *United States*, 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147;

Railroad Commission of Texas v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 60 S. Ct. 1021, 1023, 84 L. Ed. 1368; 311 U. S. 570, 61 S. Ct. 66, 167, 343, 85 L. Ed. 321.

The Wisconsin statute, sec. 100.03, Wis. Stats. 1939, provides:

"(5)(f) Determinations of the department under this subsection shall be by general order in the manner provided in section 93.18."

("93.18 Hearings; orders, service; procedure; revocation. (1) The department shall publish notice of any public hearing, except under subsection (3) of section 100.20 or under subsection (3) of section 100.19.

"(2) The department, in any matter arising under subsection (3) of section 100.20 or under subsection (3) of section 100.19, shall serve a complaint, prepared in the name of the department, upon the person against whom the complaint is made and shall accompany such complaint by notice of public hearing to be held in the matter not sooner than ten days after such service. The person against whom the complaint is made shall be entitled to be heard in person, or by agent or attor-

ney, and shall have subpoena process to compel the attendance of witnesses.

"(3) The department shall publish all general orders.

* * * * * * *

"(6) The department shall make its own rules of procedure and practice not inconsistent with any provision of this chapter or with any other provision of law governing such procedure or practice.

"(7) The department may revoke or amend any standard, order or regulation made under this chapter; provided, that public hearing has been held and notice thereof given in the same manner as is prescribed for the making of such standard, order or regulation. The revocation or amendment of any standard, order or regulation shall not affect any civil or criminal liability for offenses committed, penalties or forfeitures incurred, or rights of action accrued under such standard, order or regulation before the revocation or amendment thereof, whether or not in the course of prosecution or action at the time of such revocation or amendment; and any prosecution or action founded upon any such standard, order or regulation as it existed prior to the time of revocation or amendment, whether such prosecution or action was instituted before that time or not, shall proceed to judgment in the same manner and to the like purpose and effect as if the standard, order or regulation had not been revoked or amended.")

"(7) All questions of fact under this section shall be determined by the department, in written findings, and the provisions for judicial review of orders or regulations made under this section shall be as prescribed in chapter 102 in so far as the provisions thereof are applicable."

("102.23 Judicial review. (1) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been rendered thereon or not, shall be subject

to review only in the manner and upon the grounds following: Within thirty days from the date of an order or award originally made by the commission as a body or following the filing of petition for review with the commission under section 102.18 any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. In such action a complaint, which need not be verified, but which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the commission, or any member of the commission, shall be deemed completed service on all parties. * * * The commission shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint, which answer may, by way of counterclaim or cross complaint, ask for the review of the order or award referred to in the complaint, with the same effect as if such party had commenced a separate action for the review thereof. With its answer, the commission shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its order, findings and award. Such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in section 270.72, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action. * * * Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

(a) That the commission acted without or in excess of its powers.

(b) That the order or award was procured by fraud.

(c) That the findings of fact by the commission do not support the order or award.

(2) Upon the trial of any such action the court shall disregard any irregularity or error of the commission unless it be made to affirmatively appear that the plaintiff was damaged thereby. * * *")

The refusal of the State supreme court to consider the issue of no "cash and carry" differential, upon the appeal or upon motion for rehearing, does not present a Federal question, and the issue not having been seasonably raised or decided by the State supreme court, it cannot be raised in the United States Supreme Court.

Herndon v. *Georgia*, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530.

Even if the defendants had not by stipulation waived that question, still a Federal question would not be presented in the United States Supreme Court, for the State statute provides an administrative remedy which the defendants have ignored.

Utley v. *St. Petersburg*, 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155;

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 172, 55 S. Ct. 7, 79 L. Ed. 259.

If any general question of the constitutionality of price fixing under the milk control statute could now be raised, it still would not present a Federal question, for when an argument "goes contrary to so many decisions", especially recent ones, "it must be condemned as unsubstantial." *Utley* v. *St. Petersburg*, 292 U. S. 106, 111. "The mere fact that the act fixes prices * * * does not raise substantial federal questions." *Mayo* v. *Canning Co.*, 309 U. S. 310, 318.

In any event, the attempted issue is ruled against appellant by the recent milk control decisions of this Court.

Nebbia v. *New York*, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940;

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 55 Sup. Ct. 7, 79 L. Ed. 259;
Borden's Co. v. *Ten Eyck*, 297 U. S. 251, 56 Sup. Ct. 453, 80 L. Ed. 669;
Highland Farms Dairy v. *Agnew*, 300 U. S. 608, 57 Sup. Ct. 549, 81 L. Ed. 835.

When an argument "goes contrary to so many decisions", especially recent ones, "it must be condemned as unsubstantial".

Utley v. *St. Petersburg*, 292 U. S. 106, 54 Sup. Ct. 593, 78 L. Ed. 1155.

The Appeal in This Court.

It is submitted that no substantial Federal question is presented by this appeal, and the attached motion to dismiss the appeal should be granted.

Failing this, it is submitted that as to any Federal question that may be presented, the decision so clearly must go against appellant that judgment of affirmance should be entered without further argument.

Since the statute expires of its own limitation on December 31, 1941, it likely will be moot before it can be reached and determined in this Court, and hence delay be the only result of this appeal. Under this circumstance, we feel justified in calling to this Court's attention that appellant's jurisdictional statement and statement directing respondent's attention to paragraph 3 of Rule 12 of this Court, was not served within the 5 days required by paragraph 2 of Rule 12, and that respondent does not waive this failure.

FRED M. WYLIE,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 185

STATE OF WISCONSIN ex Rel. Department of Agriculture,

Plaintiff and Respondent,

vs.

GILBERT REUTER,

Defendant and Appellant.

MOTION TO DISMISS OR AFFIRM.

Upon the attached statement against jurisdiction and upon motion to dismiss or affirm, respondent moves in the alternative:

That the appeal be dismissed for failure to present a substantial Federal question and for failure to serve jurisdictional statement and notice of Rule 12 within the time required.

That the judgment be affirmed for the reason that any question raised is so clearly ruled against appellant by recent decisions of this Court that further argument is unnecessary.

Fred M. Wylie,
State Capitol, Madison, Wisconsin,
Respondent's Attorney.

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